

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 THE HON. MICHAEL J. McSHANE, JUDGE PRESIDING

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5
6 UNITED STATES OF AMERICA,)

7 Government,)

8 v.)

No. 6:14-cr-00482-MC-1

9 DANIEL STEPHEN JOHNSON,)

10 Defendant.)
11 _____)

12
13 REPORTER'S TRANSCRIPT OF PROCEEDINGS

14 EUGENE, OREGON

15 TUESDAY, APRIL 24, 2018

16 PAGES 1 - 71
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PROCEEDINGS

TUESDAY, APRIL 24, 2018

THE CLERK: United States District Court for the District of Oregon is now in session, the Honorable Michael J. McShane presiding.

Now is the time set for Criminal Case 14-00482, United States of America versus Daniel Stephen Johnson, pretrial conference.

THE COURT: All right. Thanks, folks. I apologize, once again, for having to listen to me under these circumstances, but if you can't hear me, please ask me to repeat myself.

We left off yesterday talking about instructions on Counts 1 through 6, and I have sent both sides proposed instructions.

Let me start with the government, maybe your thoughts on combining the attempt with the completed offense in Counts 1 through 6.

MS. BRITSCH: Good morning, Your Honor. I think the government agrees that that is a fine way to approach combining both the completed offense and attempted offense, and we agree with the court's instructions on that point.

THE COURT: The attempt on Count 8, that seems very confusing to me.

MS. BRITSCH: Yes, Your Honor. We apologize for

09:24:40 1 the confusion. I think the government initially indicted
2 that way.

3 The court may recall there was some ambiguity in
4 the model jury instructions for the Ninth Circuit on the
5 elements of that offense. The court has already addressed
6 that in a prior order on our motion. So now that that issue
7 is clarified, we don't intend to proceed on the attempt
8 theory.

9 We think the attempt theory is sometimes used in
10 cases where, for example, somebody has the intent to abuse a
11 child, perhaps shows up at the airport, and is stopped
12 before he gets on the plane. But obviously that's not the
13 scenario we have here, so we agree with the court that the
14 attempt instruction isn't necessary and is not applicable
15 here. We apologize for any resulting confusion.

16 THE COURT: All right. Thanks.

17 All right. For the defense.

18 MR. WEINERMAN: Well, Judge, that's our problem
19 with the instruction, obviously.

20 THE COURT: I know.

21 MR. WEINERMAN: Our problem is that we still feel
22 it's deficient in not requiring the mens rea that we have
23 asserted that it should.

24 So, you know, I understand the court's ruling, but
25 I just want to make sure our record is clear that we do

09:25:44 1 believe that there should be an instruction as to the mens
2 rea that -- and preferably that Mr. Johnson traveled with
3 the intent or the dominant primary purpose of engaging in an
4 illicit sexual act.

5 Now the court, if I understand the court
6 correctly, is not going to instruct the jury in the actual
7 instructions on Counts 1 through 6 regarding the commercial
8 sex act aspect. You know, the -- the statute has two ways.
9 Most of the courts, including the Ninth Circuit, have upheld
10 the commercial sex act prong. But there are some courts
11 that have not upheld the other, noncommercial prong, if I
12 could use that term.

13 So we would prefer that the judge -- that you, I
14 am sorry, instruct the jury that the offense -- in the
15 instructions that they have to find that the offense
16 involved commerce in order for them to convict.

17 I know the court is apparently going to put
18 something in the verdict form about that, but we think the
19 jury should be instructed that -- in fact, we submitted a
20 proposed instruction, and I am recalling it requires that
21 the government prove that there was money or gifts or other
22 property exchanged for illicit sexual conduct. So we think
23 that would be a good way of instructing the jury as to the
24 commerce sex offense prong of the statute.

25 THE COURT: All right. And you may be well

09:27:21 1 correct in your assessment of what the law is. I know
2 there's a lot of splits among the circuits in whether the
3 statute can survive without a commercial sex act.

4 My feeling, I think I expressed it in the e-mail
5 last night, is that what Congress is trying to do is stop
6 the market for child sex in foreign commerce in another
7 country, and that, in and of itself, is enough for it to
8 survive a challenge.

9 So we will instruct on commercial activity and
10 then add the interrogatory. And if they unanimously agree
11 to that, the case would fall under the *Clark* case in any
12 event. If they don't, you know, you have preserved your
13 issue that they needed more.

14 MR. WEINERMAN: So the court is not going to tell
15 the jury they have to unanimously agree on the same theory
16 of 2423(c) liability, either commercial or noncommercial.
17 They are just not going to be instructed at all about that,
18 but there will be a question or interrogatory of some sort
19 in the verdict form?

20 THE COURT: Yes. I mean, I will give them an
21 instruction on what commercial activity is or a commercial
22 sex act, I think is what we would describe.

23 MR. WEINERMAN: Right.

24 THE COURT: In terms of the unanimity, we may want
25 to --

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(Reporter interrupted.)

THE COURT: Unanimity, we are going to have to figure out how to capture that in the verdict form.

All right. With regard to, I think, Mr. Weinerman, you wanted some time to talk to your client about your defenses in light of my preliminary rulings on the evidence.

So where are we with that?

MR. WEINERMAN: Judge, where we are, and we do have a question -- first of all, we appreciate very much the time and the thought put into the preliminary rulings. And we have taken them to heart, and we are not going to pursue the defense that -- my understanding is the court would be more inclined to let in much of the 404(b) other act evidence if we pursue that defense. So we are not going to allege that -- by calling Detective Harrison and other witnesses that Detective Harrison contaminated, poisoned, tainted witnesses by telling -- telling things, saying things to witnesses that tended to influence their -- their testimony and cause them to be biased against Mr. Johnson. So we are not going to pursue that.

THE COURT: All right.

MR. WEINERMAN: We do have a question, though. And I know we get into this opening the door. If we are going to do that, we want to make sure we are not going to

09:30:29 1 open the door. I always like to say that the Federal Rules
2 of Evidence do not --

3 *(Reporter interrupted.)*

4 MR. WEINERMAN: The Federal Rules of Evidence do
5 not have a provision calling for the concept of opening the
6 door, but I know it's something that is commonly relied upon
7 by judges to make evidentiary rulings, so I know we have to
8 deal with the opening-the-door theory.

9 So we don't want to open the door. But we do, if
10 the court will permit us, have some just general questions
11 to make sure that we don't open the door and have the court
12 change its preliminary ruling not to allow much of the 404
13 other act evidence.

14 THE COURT: Right. So if you are not going to
15 pursue that defense, my thought is nothing about -- nothing
16 that occurred in the United States in Yamhill or Lincoln
17 County would come into evidence, including the testimony of
18 the two Jaeger brothers.

19 I understand that there's an alternative theory
20 that their testimony should come in under 413 or 414, but
21 balancing the limiting factors, those acts seem distant in
22 time. They date back to 1992. In two of the acts
23 Mr. Johnson himself was a minor. In the one act in which he
24 was a young adult --

25 *(Reporter interrupted.)*

09:31:54 1 THE COURT: In the one act in which Mr. Johnson
2 was a young adult and was alleged to have abused Kevin
3 Jaeger, it involved drinking and sexual contact.

4 So because they are distant in time and not
5 similar in nature, my fear is that the jury will give undue
6 weight to those acts in determining what occurred in the
7 charges before us.

8 So because of that distance in time and
9 dissimilarity in 403 weighing factors -- as I weigh those
10 factors under 403, I think the prejudicial effect outweighs
11 the probative value.

12 The government has other evidence to corroborate
13 the child molestation that occurred in the counts alleged.
14 That other evidence, though, of course, is other acts of
15 sexual abuse against the same victims listed in the
16 indictment and other children in the Hope Transitions during
17 that same period of time. Under *LeMay*, that would come in
18 under 413 or 414 because they are similar in nature; close
19 in time.

20 The statements -- or the government is also
21 introducing that evidence for other counts in which they
22 have to prove his purpose for travel, which would be --
23 which isn't specific to any one of the child victims.

24 So the abuse that occurred, the other acts that
25 occurred in Cambodia would come in. The acts that occurred

09:33:55 1 in the United States would not. The only reference, then,
2 to what occurred in the United States would be that he had a
3 warrant for his arrest, but we would not go into what the
4 nature of that warrant was.

5 So does that answer the majority of your
6 questions?

7 MR. WEINERMAN: Yes, that does answer the
8 question.

9 I actually have two clarifications that we are
10 seeking.

11 The images that we have been, you know, debating
12 since the motion hearings, the overridden images, what --
13 since we are not going to be presenting the defense that we
14 said in our trial memo, what's the court's ruling on that?

15 THE COURT: Well, again, a lot of it depends on
16 what kind of -- if and what kind of character evidence you
17 may be presenting at trial. If you have people taking the
18 stand to say that he's always sexually appropriate around
19 children, I think you are going to be hammered with every
20 one of those photographs.

21 MR. WEINERMAN: We don't intend to do that, Judge.

22 THE COURT: Okay.

23 MR. WEINERMAN: The only evidence we are bringing
24 in relates to what his purpose was and what his intent was
25 in going to Cambodia, which I think we have laid out in the

09:35:14 1 trial memo. It has nothing to do with being sexually
2 appropriate with children but, you know, what he did,
3 charitable work and that sort of thing. So --

4 THE COURT: All right. Then my thought is, is
5 that there is one photograph that at least appears to
6 corroborate the testimony of one of the victims.
7 Mr. Johnson took a photo of him on the iPhone during a
8 period in which they were having anal sex. The fact that
9 there is a similar photograph on the iPhone I think
10 corroborates that testimony, and I would allow in that
11 single image at this time.

12 MR. WEINERMAN: And Judge, before -- would the
13 court -- one of the things I did ask is when we were here on
14 the motion to suppress we did not have the photos in front
15 of us. So -- and counsel brought them to court yesterday.
16 And I know we are just dealing with one photo, but we would
17 like to take a look at that photo and see if there's any
18 arguments that we can make that it doesn't depict what
19 everybody seems to think it does and that it's overridden to
20 such an extent that it shouldn't come in.

21 So we would really like to have that photo in
22 front of us when we are making those arguments.

23 THE COURT: All right.

24 MR. SWEET: Your Honor, we have a notebook for the
25 defense as well. So we can -- when we have that argument,

09:36:37 1 we'll bring that back up, along with the other images.

2 THE COURT: Okay. And you can reraise that issue
3 if we need to look at it further.

4 MR. WEINERMAN: All right. It's simple. It's
5 down to one photo now, so we can, you know, make whatever
6 arguments because it's been a while. I have seen them
7 twice, once in a large version and once it was just a
8 thumbnail, which wasn't really of good quality. So we would
9 like to take another look at it.

10 THE COURT: All right.

11 MR. SWEET: Your Honor, it's available at any time
12 if Mr. Weinerman or Ms. Hay wants to come -- excuse me --
13 Ms. Maxfield wants to come and see them.

14 MR. WEINERMAN: And I appreciate that, but I would
15 prefer having it in court while we are in session outside
16 the presence of the jury so we can make our record.

17 MR. SWEET: Sure.

18 And, of course -- I am sorry. I didn't mean to
19 make those exclusive. We'll bring that to court as well.

20 The only other question I had, Your Honor, on that
21 is the court in its preliminary opinion said if a defense
22 expert testifies that Mr. Johnson's behavior was culturally
23 appropriate, then they could be impeached.

24 And I think would it also depend on what
25 Mr. Roloff said, if anything, in terms of what the other

09:37:41 1 photos as well.

2 Would that fall under what the court was talking
3 about, depending on -- so that that could also result in the
4 photos being admitted?

5 THE COURT: Right. I mean, I can imagine a lot of
6 ways this case could go where those photos are going to
7 become relevant. And I think I listed in the preliminary
8 order, you know, certain kinds of character evidence:
9 Reputation for appropriateness around children, lack of
10 interest in the male children, culturally appropriate
11 behavior around children.

12 And that's why I want to take a wait-and-see to
13 see if that evidence in fact does open the door. I know
14 it's not a term that the defense likes, but evidence is
15 always changing. We don't always know exactly how the
16 defense witnesses are going to specifically testify. But I
17 can see many ways in which the photos would come into
18 evidence, just depending on how it's presented.

19 MR. SWEET: Thank you, Your Honor.

20 MR. WEINERMAN: And the government has our -- we
21 have a cultural expert, and the main areas that we think are
22 relevant -- a lot of the witnesses that the government is
23 going to call, people who are affiliated with churches who
24 were funding Hope Transitions Center, they are going to
25 testify, it is my understanding, that they deemed some of

09:39:05 1 the things they saw to be inappropriate; specifically, kids
2 giving adults massages and people sharing beds. And in
3 Cambodia that's not unusual. That's what our cultural
4 expert says, that children commonly give adults massages;
5 that it's culturally appropriate.

6 So that is the type of testimony we would be
7 bringing in. Certainly, if that is going to change the
8 court's ruling on the admissibility of all of the images or
9 even one, then we certainly would like to know that. I know
10 the court maybe needs to hear the testimony first, but maybe
11 we could go outside the presence of the jury on that one
12 aspect.

13 THE COURT: Well, if you keep it very general --

14 MR. WEINERMAN: Okay.

15 THE COURT: -- you are probably in safe territory,
16 but the minute you want your expert to draw a conclusion
17 that your client's specific behavior was culturally
18 appropriate --

19 MR. WEINERMAN: Right.

20 THE COURT: -- I think that's going to open the
21 door to questions: Would you still think this is culturally
22 appropriate if you knew he had these pictures on his phone?

23 MR. WEINERMAN: Okay.

24 THE COURT: The answer obviously is going to be,
25 "God, no."

09:40:24 1 So it's how you -- you are going to have to limit
2 it to a very general cultural experience.

3 MR. WEINERMAN: All right. Thank you.

4 THE COURT: Okay. Other things we need to talk
5 about by way of evidence?

6 MR. SINHA: No, Your Honor.

7 THE COURT: Okay.

8 MR. SWEET: And I am sorry, Your Honor. Was that
9 just regarding the evidence or was that a more open
10 question?

11 THE COURT: I guess it was specific to the motions
12 in limine on evidence.

13 Is there any on other things?

14 MR. WEINERMAN: Yeah, I do think we have some.

15 Yes. And this is in no particular order.

16 It -- I am -- there are named victims in Counts 1
17 through 6. The government seems to be taking the position
18 that they don't have to name a victim in Counts 7 and 8. We
19 find that troubling.

20 I don't know how a jury can be instructed whether
21 Mr. Johnson is guilty or not guilty when the government
22 doesn't name a specific victim, and that's what they seem to
23 be doing in Count 7.

24 I am not sure if it's the entire universe of kids
25 in Cambodia that they say were the subject of his traveling

09:41:34 1 with the purpose and intent of committing an illicit sexual
2 act or a specific individual, but it creates a lot of
3 problems. It's vague, and it doesn't require a jury to
4 unanimously agree who the victim was.

5 So it seems to me that statute, 2423(b), requires
6 the government to name a victim. And if they are not going
7 to name a victim, then the jury has to be given some
8 guidance, including they have to unanimously agree or else
9 the count is duplicitous. It, in one count, alleges
10 multiple offenses. And in this instance, "multiple" meaning
11 in the -- perhaps the dozens. And I don't see how we can go
12 forward without a victim being named on that count.

13 And then on Count 8, I always thought that the
14 named victim was going to be LS XXXXX, but there may be one
15 other person, VS XXXXXXXXXXXXXXX, I believe, who may have been
16 under 12 at the time. It's not clear to me.

17 But I think the government needs to elect on both
18 those counts a specific victim or else the counts shouldn't
19 go forward.

20 MR. SINHA: So, Your Honor, the -- you know, we
21 don't -- we don't choose a specific victim on charges under
22 2423(b) And sometimes under charges 24 -- or 2241(c). And
23 the reason is that the action in the crime doesn't involve a
24 specific victim. It's just traveling across an
25 international boundary from the United States with regards

09:43:08 1 to 2423(b) or traveling across a state line, you know, both
2 with the requisite intent.

3 And so one can imagine and there are in fact cases
4 where we are charging someone with the charge contained in
5 Count 7 who has outwardly evinced the intent to travel
6 abroad to have sex with children. But since he hasn't
7 arrived yet, he doesn't know which specific children he
8 wants to have sex with. So we wouldn't be able to name a
9 victim because we would have no idea.

10 It would be, on some level, analogous to saying
11 that someone is possessing drugs with the intent to
12 distribute them. We don't have to show who specifically
13 they wanted to distribute them to. It's the intent, and
14 then the action in the instance is the travel.

15 So I think the court addressed this in its bill of
16 particulars ruling, and I think that's consistent with the
17 law with regard to the level of specificity that the
18 government has to show.

19 I do agree with Mr. Weinerman that there is a
20 concern with regards to Count 7 and 8 that may implicate
21 duplicity.

22 And so there -- again, the action in these counts
23 is the travel. And so what we would suggest to the court
24 and to counsel, respectfully, is that we'll submit a special
25 unanimity instruction for those counts that allows the jury

09:44:31 1 or that instructs the jury to agree unanimously on a
2 specific trip. They don't need to agree on a specific
3 victim because that's not an element of the crime, but they
4 do need to agree on a specific trip for each count.

5 So that would be our suggestion.

6 THE COURT: All right. I agree with the
7 government that they are not required to name a specific
8 victim in Count 7 and 8. The statutes that cover those two
9 counts are really inchoate crimes punishing a substantial
10 step towards the commission of the act.

11 The only thing that the government has to prove is
12 they traveled either across state lines or traveled to a
13 foreign country with a specific intent to engage in sexual
14 acts with minors but not with a specific minor. It's just
15 not what Congress intended.

16 MR. WEINERMAN: Well, how does the court feel
17 about the unanimity instruction, then?

18 I mean, we --

19 THE COURT: That's fine on a single trip, yeah.

20 MR. WEINERMAN: Single trip.

21 So the court -- it's fine on both counts. The
22 government does not have to specify -- the jury does not
23 have to unanimously agree as to which particular victim,
24 only a particular trip.

25 THE COURT: Correct.

09:45:56 1 All right. Other things from the defense?

2 MR. WEINERMAN: Yes. We have an objection to a
3 couple of the government's voir dire questions. Let me find
4 it and I will -- whenever the court is ready, I
5 can (indicating) --

6 THE COURT: Okay.

7 MR. WEINERMAN: So it would be on Page 2, Question
8 6 or 7, which seemed to be -- to have the same objection
9 that the government made. And the court's concerned about
10 conditioning jurors as to the credibility of a particular
11 witness. 6 seems to talk in terms of conditioning the
12 jurors about children telling the truth about important
13 matters. And No. 7, it almost presupposes that their
14 witnesses who are minors have experienced trauma and they
15 behave in a certain way.

16 So it just seems like these are more like the
17 conditional questions that the court has ruled the defense
18 shouldn't be permitted to ask, and the government shouldn't
19 be able to ask similar conditional questions either.

20 THE COURT: I think you can ask them about any
21 experiences they have but not about expectations with regard
22 to trauma. I don't think Question 6 goes towards the
23 qualifications or bias of jurors.

24 So I will strike 6 and 7.

25 MR. SWEET: Your Honor, may I follow up with one

09:47:37 1 question?

2 THE COURT: Yeah.

3 MR. SWEET: I believe yesterday when we covered
4 the defense questions, there are 55.

5 THE COURT: Right. There's one I needed to get
6 back to.

7 MR. SWEET: That's on page 8.

8 And that question is, "Do you believe that
9 witnesses who are teenagers or young adults would never
10 lie?" I don't believe I have that one marked as being
11 struck by the court.

12 THE COURT: I can strike that one.

13 MR. WEINERMAN: Which number was that, counsel?

14 MR. SWEET: 55 on Page 8.

15 *(Court conferred with law clerk.)*

16 THE CLERK: I think that was yesterday we talked
17 about -- I think you asked to strike 48 yesterday.

18 MR. SWEET: That's correct. I did not ask to
19 strike 55 yesterday. And I do think it is fairly similar to
20 the government's question 6.

21 THE COURT: It is. I did want to clarify.

22 MS. MAXFIELD: Your Honor, can I jump in here and
23 just ask a question since I think I will be doing the voir
24 dire.

25 I imagine that this is going to be sort of a

09:48:51 1 hybrid between federal court and state court, but typically
2 I wouldn't just read questions off a sheet because the jury
3 will be comatose.

4 THE COURT: Right.

5 MS. MAXFIELD: In fact, if that's going to happen,
6 I would ask the court to read the questions off the sheet
7 and not us.

8 I am wondering if we'll have a little bit of -- as
9 long as we are within the subject matter and we know where
10 the lines are --

11 THE COURT: Yes.

12 MS. MAXFIELD: -- if there is some freedom in how
13 we approach this and maybe follow-ups from the
14 questionnaire.

15 THE COURT: Right. I don't want it to be a C-span
16 congressional kind of thing. I expect you to move around
17 and have a conversation within the confines of these
18 questions.

19 You will have the questionnaires. So the idea is
20 we'll bring in -- rather than -- I think it's too much to
21 talk to all 50 people in different parts of the courtroom
22 with the public sitting among them.

23 So we'll bring in groups of -- how many did I say?

24 MR. SWEET: 16, Your Honor.

25 THE COURT: 16 we can fit easy.

09:49:47 1 You are going to have a conversational series of
2 questions with them. You may have individual questions
3 based on their questionnaires. If some of them say, "I
4 don't really want to talk about that in front of the
5 people," when we are done with the group questioning we'll
6 send them to the jury room and bring them out individually
7 if we need to.

8 MS. MAXFIELD: Okay.

9 THE COURT: But, yeah, I am not expecting you just
10 to read questions to each of them individually. Make it
11 conversational. Have them raise their hands and talk. So
12 very much more like state court, I think. Other than when
13 they come in, me reintroducing you and asking them just to
14 state their names, where they are from, that's about my
15 involvement.

16 MR. WEINERMAN: So we have some other --

17 THE COURT: And I did want to clarify. I did mean
18 to strike question 48 on Page 7. I don't think I actually
19 got to that yesterday. I had meant to earlier.

20 MR. WEINERMAN: Question 48 on the defense
21 proposed?

22 THE COURT: Yeah. Yes.

23 MR. WEINERMAN: All right.

24 So we do have some other issues we'd like to bring
25 up.

09:50:59 1 So getting back to what opens up the door and what
2 doesn't open up the door, we have represented, and I think
3 it -- and it's true that Detective Harrison told Karla
4 Comstock that Mr. Johnson had sexually abused the Lincoln
5 County alleged victims.

6 Okay. I am going to say it this way: Detective
7 Harrison told Karla Comstock that the FBI had discovered
8 that in the summer of 2013 Mr. Johnson flew to the United
9 States with three boys and then wired money to Hope
10 Transitions Center, and that influenced the testimony of the
11 person that she told that to, which I believe was eventually
12 BT XXXXXXXX.

13 So without getting into the specifics, the
14 question we have, are we opening up the door if we question
15 the church witness regarding what he or she told Cambodian
16 kids about Mr. Johnson?

17 So, again, there are these things out there that
18 Mr. Johnson brought kids over and the kids are unaccounted
19 for, that he sexually abused kids in the United States, and
20 there's some other things that he said.

21 So the question is we are not -- we don't even
22 have to ask the question in terms of what Detective Harrison
23 told the person, but if a witness like Karla Comstock, who
24 is a supporter of the Hope Transitions Center and sponsored
25 many -- some of the kids there and helped, whether we would

09:52:41 1 be permitted without opening up the door to ask her whether
2 she told such things to any of the witnesses.

3 MR. SWEET: Your Honor, the -- I think it's
4 interesting because at some point the defense could
5 essentially, without saying this is our defense, through a
6 series of questions to witnesses, basically back into the
7 same position without saying our defense is Detective
8 Harrison tainted all these witnesses.

9 But by the same token, I do understand why they
10 would want to ask Karla Comstock and a few others,
11 potentially, "When you were being interviewed and you were
12 told this information, did that change what you said or did
13 that affect information you provided?"

14 And so I do think it's a little bit of a tricky
15 question just because there is probably a point to which it
16 is -- it is appropriate that they be able to ask
17 Ms. Comstock, "Was what you provided, the information
18 provided, influenced by questions you were asked or the
19 information you were given?"

20 I think it is difficult until we sort of hear it
21 to actually know how repetitive it is, how it's done and how
22 it's presented. And so I think it might have to be
23 something that the court would decide on at that point.

24 THE COURT: So is the testimony that Ms. Comstock
25 would say that she told the boys in Cambodia that

09:55:46 1 his last name.

2 THE COURT: Okay. So she is not talking about
3 events that occurred in Yamhill County or Lincoln County.
4 She is talking about a suggestion that --

5 MR. WEINERMAN: Right.

6 THE COURT: -- Mr. Johnson is taking kids into I
7 guess what would be the sex slave industry and done
8 something with them in the United States.

9 I think you can go into that. I am not sure what
10 door it would open to -- I mean, they can ask her where she
11 got that information from, I suppose --

12 MR. SWEET: And, Your Honor, I --

13 THE COURT: -- and whether she believed it at the
14 time, but.

15 MR. SWEET: I apologize. I didn't know if you
16 were done.

17 THE COURT: No. Go ahead.

18 MR. SWEET: I believe Detective Harrison, when he
19 did interview at least Karla Comstock and potentially others
20 would ask a question about this kind of information or maybe
21 even make a statement. And so -- and I think some of those
22 statements, I think the defense is correct, and I don't know
23 who it was passed on to, but some of that information would
24 kind of get through or be relayed on to other people.

25 So I don't think the government's position is that

09:57:00 1 every question that they ask a witness such as Karla
2 Comstock in terms of were you told this, did that influence
3 you --

4 THE COURT: Sure.

5 MR. SWEET: -- did that impact what you said, I
6 don't think our position would be that any question like
7 that would open the door.

8 But I do think if there was at some point -- at
9 some point they could essentially cross a line that would
10 become Detective Harrison did it, as the defense, being sort
11 of it's resurrected.

12 MR. WEINERMAN: I think if we were going to get
13 into that we would scrupulously avoid identifying the source
14 as Detective Harrison.

15 THE COURT: All right. I think you can ask
16 generally what you have just described without opening any
17 great doors.

18 MR. WEINERMAN: Can I just check my notes here,
19 Judge, to see if there was anything else?

20 I am not suggesting that we do this now, but I
21 think probably both sides have some objections to exhibits.
22 And I don't know if the court is willing to maybe hear those
23 on Friday while the jury is filling out the questionnaire
24 because we have to make some -- we have to file an amended
25 exhibit list because we are going to withdraw some of our

09:58:09 1 exhibits. I don't know if we really need to do that now,
2 but obviously the court decides that.

3 THE COURT: Well, why don't you folks confer.

4 MR. WEINERMAN: Yes.

5 THE COURT: I know that after the jury orientation
6 there is a presentation in here for high school students
7 that will go probably through lunch. But I can certainly
8 spend some time, probably Friday afternoon, going through
9 exhibits if you need some rulings on them pretrial.

10 MR. WEINERMAN: Yes.

11 THE COURT: Okay.

12 MR. SWEET: We appreciate that, Your Honor. Then
13 that would allow us to use exhibits in opening.

14 If counsel doesn't have anything -- do you have
15 anything else, Mr. Weinerman?

16 MR. WEINERMAN: One moment.

17 I think that's it for now.

18 MR. SWEET: Your Honor, I have two things.

19 One, the defense and the government have discussed
20 switching sides during trial, and we wanted to seek the
21 court's permission for that. The marshals were fine with
22 that. We discussed that with Mike Bryant and said that
23 basically we would sit there and they would sit over here,
24 if that's acceptable to the court.

25 THE COURT: Any objection?

09:59:23 1 MS. MAXFIELD: Your Honor, we would like to test
2 drive because I don't think we are going to be able to see
3 the witnesses from over there, and our client certainly
4 wouldn't be able to. So maybe at the break we could try it
5 out.

6 THE COURT: Okay. I think the concern, I assume,
7 is that you are afraid your alleged victims are in too close
8 a proximity to Mr. Johnson when they walk up to the witness
9 stand.

10 MR. SWEET: Walk up, yeah, Your Honor, and even
11 just testifying they would be basically in the direct line
12 of sight. I mean, they would be basically looking at
13 Mr. Johnson, and so--

14 MS. BRITSCH: And for the same reason Ms. Maxwell
15 is concerned about sitting here, that if we are sitting here
16 questioning, for example, one of the children --

17 MS. MAXFIELD: They already did a test drive.

18 MS. BRITSCH: -- we may not be able to -- the
19 child may not be able to see us sufficiently.

20 THE COURT: Well, I don't have any rules about you
21 having to sit at counsel table.

22 MS. BRITSCH: Okay.

23 THE COURT: So I would expect that both sides,
24 when the children are testifying, especially if they are
25 particularly shy or quiet, that you not question them from

10:00:25 1 this far away and that you get up.

2 So I guess my preference would be that you switch
3 just because there's not a way to bring people around this
4 way.

5 And, Mr. Johnson, I am not suggesting that --
6 anything by this other than we are dealing with children who
7 believe certain things, whether they are correct or not, and
8 they have they may have an emotional response to you, and
9 I'd like to limit that as much as possible. So one way of
10 doing that would be to switch tables.

11 And if we need to get taller chairs on the witness
12 stand, we can do that. But I am expecting that as attorneys
13 you will move about and move closer. I mean, don't move so
14 close that they are intimidated but close enough where it's
15 conversational with them.

16 MR. SWEET: Thank you, Your Honor.

17 MR. WEINERMAN: I think we have something else we
18 want to talk to the court about.

19 MS. MAXFIELD: Your Honor, I want to address two
20 issues from the court's ruling. The first is with respect
21 to Dr. Goodman.

22 And the court is correct. We are not quarreling
23 with her credentials at all, but we are quarreling with
24 whether the science that she relies upon matches up with the
25 facts in this case because I think that everything -- every

10:01:47 1 study that she cites, and I think really almost all the
2 studies that exist, study western cultures and really have
3 nothing to do with a Southeast Asian culture or Cambodian
4 culture in particular.

5 And we believe that the science is so mismatched
6 that there should be a *Daubert* hearing in which we can sort
7 out with Dr. Goodman why it is she thinks that she can take
8 the science that she has relied upon and apply it to this
9 culture.

10 The court's ruling didn't address that, and we
11 think it's one of the more important arguments that we made.

12 THE COURT: All right.

13 MR. SINHA: Your Honor, I think -- you know, I
14 don't know if it is as apparent from her CV. I think
15 Dr. Goodman is frankly among the world's foremost experts on
16 this area. She has read and studied a great number of -- I
17 mean, she has written, I think, over 200 articles on
18 subjects related to this.

19 THE COURT: Right.

20 MR. SINHA: And in the course of that and winning
21 a series of national and international awards has read the
22 literature that exists.

23 You know, *Daubert* doesn't require a perfect
24 knowledge of a subject area. And insofar -- you know, it
25 doesn't require that the exact thing that she is opining on,

10:02:57 1 which in this instance is going to be obviously not case
2 specific, it's going to be general, general things that
3 occur with regards to sex abuse, you know, as noticed in her
4 expert notice.

5 So she is not going to be talking about these
6 victims. She is obviously not going to be talking about the
7 defendant.

8 Insofar as they think there's a dissimilarity or
9 some tension between the research that's been conducted
10 pretty much across the world on these subjects and what
11 would happen with Cambodian victims, they perhaps can
12 cross-examine her on that, but I don't think it's a reason
13 for a *Daubert* hearing. I don't think it's anything that
14 would undermine the court's *Daubert* ruling.

15 THE COURT: I guess I would hate to get to
16 cross-examination after she testifies only to find out her
17 saying, "I don't know if any of this would apply to the
18 cultural situation in Cambodia."

19 MR. SINHA: Sure.

20 THE COURT: So I think it's probably worth our
21 time, before she testifies, for you to ask her at least some
22 questions about the applicability of her understanding of
23 the science and child sex abuse in general to Cambodian
24 culture. And if she could answer that there are some
25 universal generalities that could be made about child sex

10:04:16 1 abuse in any country or that she is aware of the cultural
2 issues in Cambodia and similar foreign countries to be able
3 to apply this kind of general knowledge and skill that she
4 has, then I allow it in. If she says, "I have no idea if it
5 applies to Southeast Asian culture," then there would be
6 some, obviously, difficulties having her testify. So why
7 don't we handle that right before she testifies.

8 MS. MAXFIELD: There's one other issue with
9 respect to Goodman, and that has to do with the horror
10 stories that she told in the *Chivoski* trial.

11 (Reporter interrupted.)

12 MS. MAXFIELD: Pardon me?

13 The horror stories that she told in the *Chivoski*
14 trial.

15 And we laid out one of the horror stories that had
16 us concerned. We certainly wouldn't want that to be
17 repeated in our case, where she takes -- she just kind of
18 goes on paragraph after paragraph after paragraph describing
19 a pretty chilling set of factual circumstances that underlie
20 a study that she did that really have nothing to do with the
21 study and nothing to do with our case; instead would just
22 kind of be prejudicial and harmful to our client.

23 And so we would just like a preemptory ruling
24 where the government warns the witness, because she loves
25 these stories, that she is not allowed to go into a really

10:05:37 1 detailed account that talk about the facts of an unrelated
2 criminal prosecution.

3 THE COURT: That does seem reasonable that she not
4 go into lengthy facts about unrelated cases but still keep
5 her statements down to assisting the jury in trying to -- by
6 giving them, I guess, her expertise in evaluating certain
7 subjects such as child sex abuse.

8 But launching into long stories of dramatic abuse
9 on other children, you are probably going to hear me sustain
10 some objections.

11 MR. SINHA: I will speak to her, Your Honor.
12 Thank you.

13 MS. MAXFIELD: Okay. The only other issue, Your
14 Honor, that I had for the court has to do with the rape
15 shield notice. And I think the court may have misunderstood
16 a couple of things: Number one, what we are asserting; and
17 number two, how important it is to the case.

18 With respect to -- the court says that with
19 respect to the conversation that our client had with minor
20 1, are we allowed to -- when they are adults now, are we
21 allowed to say their names in court? Because it's tough for
22 me to keep track of them.

23 MR. SWEET: We don't have an issue with that, Your
24 Honor.

25 MS. MAXFIELD: Okay.

10:06:53 1 There's a conversation that is alleged to have
2 occurred between our client and BT XXXXXXXX, who I believe is
3 minor 1. That conversation is very, very specific. It is
4 referenced by BT XXXXX in his 302s, and it occurs a day
5 before BT XXXXX leaves the orphanage.

6 And he asserts with the government that there's a
7 conversation with my client in which he confronts
8 Mr. Johnson about sexually abusing children, and then he
9 references a Facebook conversation that he has with my
10 client to support his account of what occurred.

11 And, in fact, this is a conversation that occurred
12 orally. Then there's follow-up in the Facebook account, and
13 then there's conversation that occurs after that.

14 I want to give the court a copy of the Facebook
15 reference that BT XXXXX has anchored his account of what
16 occurred before. And if the court takes a second to read
17 it, you will see that it's ambiguous what was discussed.

18 THE COURT: Okay. I guess I am not understanding,
19 though, why you can't cross-examine this particular witness
20 with regard --

21 MS. MAXFIELD: I need to get closer to the court.
22 I am sorry.

23 THE COURT: I am sorry.

24 I don't understand why you cannot cross-examine
25 this particular witness by asking him, "Was it your

10:08:50 1 conversation about punishment of children?" without going
2 into the fact that there were sexual activity going on
3 between the boys.

4 MS. MAXFIELD: Well, I think -- if he's going to
5 talk to the court or to the jury about the conversation at
6 all and suggest to the court that my client made an
7 admission of sexually abusing children at the end, we ought
8 to be able to go into the details of what was discussed.

9 There is corroboration in other Facebook entries
10 where BT XXXXX talks about the fact that there had been an
11 issue of older boys forcing sex on younger boys, and he puts
12 that on Mr. Johnson's lap, says it's his fault that that
13 occurs.

14 But Mr. Johnson has a very different account of
15 what occurred in that dispute that leads to BT XXXXX leaving
16 the center.

17 THE COURT: Right. But I don't know how your
18 bringing that out --

19 MS. MAXFIELD: Pardon?

20 THE COURT: Unless your client testifies, how is
21 it that you are going to get out that account?

22 MS. MAXFIELD: Well, we are not saying that our
23 client's not going to testify, but how -- if I am not
24 allowed to deal with the specifics of what he would say to
25 contrast what this witness is going to say on

10:10:01 1 cross-examination, how will I get it out -- are we just
2 going to hold BT XXXXX here until the defense case is
3 finished and then bring him back up to address those
4 specific issues, including finding the parts from Facebook
5 that would corroborate Mr. Johnson's account?

6 What he doesn't say in that Facebook exchange is,
7 "Mr. Johnson, you have sexually abused children." But
8 that's what he tells the FBI that the account is about. We
9 are saying that that's not what it's about.

10 THE COURT: Right. You can cross him with this.

11 MS. MAXFIELD: I can cross him with this?

12 THE COURT: I don't see why you wouldn't be able
13 to cross some of this Facebook account. This doesn't
14 reference -- I thought we were -- maybe I am confused about
15 what issue we are raising. I thought you were raising
16 issues around the prior sexual activity between the children
17 in the Hope Transitions Center.

18 MS. MAXFIELD: What we are saying is that the
19 conversation that occurred, from Mr. Johnson's perspective,
20 was a battle about whether he was too hard on kids who had
21 been caught touching each other or been accused of touching
22 each other and that he had been harsh in a way that BT XXXXX
23 found offensive.

24 That would be the conversation from his
25 perspective, and it's consistent with this Facebook supposed

10:11:29 1 confrontation that BT XXXXX has with our client.

2 We shouldn't be handcuffed on cross-examination on
3 the specifics of what they actually said to each other,
4 especially since it all ends with the supposed admission of
5 our client.

6 THE COURT: I don't see anything in my rulings to
7 prevent you from introducing this document, showing it to
8 the witness.

9 MS. MAXFIELD: But I can't ask the witness if what
10 Mr. Johnson said or what they -- whether the subject of that
11 conversation had to do with children touching each other
12 sexually? I can't confront him with that?

13 THE COURT: I think you can limit it to his --
14 that they are unhappy with his discipline of children,
15 but -- well, what's the government's view of this?

16 MS. BRITSCH: Your Honor, I think that is our
17 position that the defense is essentially -- you know, that
18 this conversation was about something else, and that
19 something else is the harsh discipline of children. And the
20 reasons underlying that discipline aren't relevant to laying
21 out that cross-examination.

22 And I think our other issue is right now -- I
23 mean, this is pure speculation. They haven't put any facts
24 into the record, and perhaps they will later, that that in
25 fact, you know, is what this conversation is about. And so

10:12:47 1 we don't believe that they can just get up there and
2 cross-examine BT XX without any foundation and say wasn't
3 this conversation about sexual activity that hasn't been
4 established by the facts in the record.

5 So both for that reason and, you know, the reasons
6 that we have already outlined in our 412 response that the
7 underlying sexual activity or alleged sexual activity of the
8 kids is not admissible and isn't necessary for them to form
9 this line of cross-examination based on the punishment.

10 MS. MAXFIELD: I think that that would leave us
11 with BT XXXXX being able to provide a detailed account of a
12 conversation, his own detailed account, and us without the
13 ability to probe whether those details are correct and
14 question on cross-examination whether his -- his version of
15 events isn't the truer version.

16 And it doesn't really matter which kids were
17 sexually acting out with each other, but BT XXXXX is
18 alleging that this was a conversation about his sexual
19 abuse, and he's saying, no, that's not true. It doesn't
20 matter which kids were involved.

21 THE COURT: Right. But, Ms. Maxfield, you don't
22 get to say, "My client says this is the way the conversation
23 went down."

24 MS. MAXFIELD: No.

25 THE COURT: "Do you agree with that?"

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MS. MAXFIELD: No.

THE COURT: And ask him to say no.

MS. MAXFIELD: No, but I should be able to ask, did he say this and did you say that and did he say this and did you say that.

THE COURT: Well, I think you can, to a degree, ask all that. You can certainly use this document. It has no reference to prior sex acts of the children within Hope Transitions.

It seems to me the focus is on their unhappiness with the discipline that's been -- that Mr. Johnson has doled out because they had broken rules. I don't think it matters what rule we are talking about.

So I will ask that you limit your cross-examination to that.

MS. MAXFIELD: I guess, then, alternatively, I would move to exclude BT XXXXX's testimony regarding this conversation.

THE COURT: All right. I will overrule that objection.

MS. MAXFIELD: The second conversation has to do with the supposed confrontation by Mr. Sopheak Vanna.

Which way is the -- is it Mr. Sopheak or Mr. Vanna?

MR. SINHA: It's really Vanna.

10:15:11 1 MS. MAXFIELD: I'm going to call him Mr. Sopheak
2 or Pastor Sopheak.

3 Pastor Sopheak talked to the FBI about a
4 conversation that he had, I believe in November of 2013,
5 after someone, and I am not -- it's not clear to me whether
6 it was -- which minor it was that came to him; that he then
7 confronted Mr. Johnson with respect to the accusation.

8 When Sopheak, who does not speak fluent English,
9 he is being questioned in English by the FBI, but when he is
10 not being led by the FBI agent to say yes or no and he's
11 actually able to expand on his own -- do we -- I am trying
12 to find that transcript. We have like three versions of a
13 transcript.

14 And I actually had a sound guy, who used to be the
15 drummer for Iggy Pop, try to clean up some of what's being
16 said on the streets in Cambodia.

17 And we believe that the government's transcript is
18 incorrect; that when he's finally allowed to tell his own
19 account of what it is he goes to Mr. Johnson with that he
20 says -- okay.

21 So the FBI agent says, "And what did ES XXX, what
22 did he hope that you would be able to tell Daniel?"

23 And we believe that what he says next is,
24 "Because -- because ES XXX -- we had the rule for boys, you
25 know, like to" -- and then we can't understand. And then

10:16:59 1 "hold," can't understand, "like a boy and a boy, you know,
2 like, or playing," unclear.

3 Then the interpreter says, "Daniel set a rule that
4 boys and boys could not hold each other and could not play
5 with each other, penis and stuff. And that's why I go talk
6 to Daniel."

7 Now, I want to be able to talk to him about this
8 specific statement that he made to the FBI about his purpose
9 in talking to my client.

10 THE COURT: So it's my understanding that he is
11 going to testify that he confronted Mr. Johnson about
12 Mr. Johnson's abuse of boys. This is a very different
13 conversation.

14 MR. SWEET: Your Honor, Pastor Sopheak actually
15 wrote a chat -- had a chat with BT XXXXXXXX where he spelled
16 out -- it's Government's Exhibit 194, if I could hand it to
17 the court. He actually spells out the subject of his
18 conversation with Mr. Johnson and what it was about. It's
19 194.

20 MS. MAXFIELD: I got that one memorized.

21 MR. SWEET: And we have a longer version of that
22 as well, Your Honor, as does the defense.

23 When Pastor Sopheak testifies, obviously we'll
24 hear what he is going to say. I think the defense will
25 hear -- thank you -- what he has to say about what he said

10:18:29 1 to Mr. Johnson and if potentially there was another
2 conversation as well.

3 But I think the conversation as described on this
4 dated Facebook post is explicitly clear, as is what follows
5 it.

6 And so --

7 THE COURT: Well, a lot of it depends on how he
8 testifies. If he testifies the conversation with
9 Mr. Johnson was a confrontation of Mr. Johnson's activity
10 with the boys, then the statement that you have,
11 Ms. Maxfield, does appear to be a prior inconsistent
12 statement if it's the same conversation.

13 MS. MAXFIELD: Well, it could be a -- did the
14 court say a prior inconsistent statement?

15 THE COURT: Yes.

16 MS. MAXFIELD: Okay. I missed the "in." So it
17 would be appropriate cross-examination.

18 THE COURT: Yes. And then we have prior
19 consistent statements that would also be coming in.

20 MR. SWEET: And if I may, just so I am clear what
21 we are talking about, counsel's discussing the transcript
22 from the interview of Pastor Sopheak with Dan Garrabrant.

23 Is that what you are going from?

24 MS. MAXFIELD: Yes. Yeah.

25 MR. SWEET: Okay.

10:19:35 1 MS. MAXFIELD: And I can send you the cleaned
2 up -- it's cleaner.

3 MR. SWEET: We'd appreciate that. Thank you.

4 THE COURT: So, yes, I think that's appropriate.
5 I mean, we need to determine what was the essence of a
6 conversation.

7 MS. MAXFIELD: Thank you, Your Honor.

8 THE COURT: All right.

9 Go ahead.

10 MR. WEINERMAN: Well, Judge, you gave me some
11 time, so I thought of some more things to bring up.

12 THE COURT: Okay.

13 MR. WEINERMAN: I think it's just one more.

14 So this is in regards to the court's ruling on the
15 titles that everybody gets a chance to use. And obviously
16 child abuse and defendant and victim, you know, we
17 understand all that.

18 We remain very concerned, though, about the
19 government -- some of the FBI monikers that I assume the
20 government would bring out when the witness hits the stand.

21 For example, I believe one of the witnesses is
22 going to say he's attached to the Violent Crimes Against
23 Children Section, and another may say that he is attached to
24 the Sexual Assault Felony Enforcement, SAFE, Team. It just
25 seems to me that those are extremely not only prejudicial,

10:20:50 1 but they tend to vouch for the testimony of alleged victims
2 who come up. You know, they are kids, and why would the
3 FBI, who is a Violent Crimes Against Children Section agent,
4 it just seems to me it's extremely prejudicial and vouches
5 for the testimony of the witnesses and just creates this
6 image of a legitimate government entity that is out there to
7 protect kids all over the world.

8 And it seems we should not be creating that image
9 and just have jurors listen to testimony without wondering
10 why would they be in these very imposing sections if what
11 they were doing was not correct, right, and such.

12 So that's our concern --

13 THE COURT: Right.

14 MR. WEINERMAN: -- about that.

15 And just one last thing. The continued attempts
16 of the government to call this child sex tourism, in one of
17 my motions I submitted what the definition is. There is no
18 legal definition. The UN, I believe -- and I am
19 paraphrasing it -- describes it as people going on organized
20 trips where they pay a -- the trip organizer. Then they
21 wind up rendezvousing with kids and paying the kids for sex.

22 This is not what this case is about, and the
23 government shouldn't be able to label it as such.

24 THE COURT: I agree that it does not sound like
25 typical child sex tourism. It sounds like allegations of

10:22:25 1 sexual abuse in a foreign country.

2 Can we limit the specialized units to having them
3 introduce themselves; then simply asking them, "Do you work
4 with a unit that specializes in child sex abuse?"

5 And then let -- I think it is important that they
6 be able to testify about their special training and
7 knowledge, but some of these titles do get a bit
8 far-fetched. I mean, we might as well have a unit that says
9 We Only Prosecute Guilty People Unit and have them testify
10 to that.

11 So let's keep the titles to just a leading
12 question: Do you work in an area, a specialty area of child
13 sex abuse?

14 MR. SINHA: Okay.

15 THE COURT: I do think that kind of leads me to
16 one question for the defense. You had one expert who was
17 testifying about things that I was struggling with.

18 All right. On -- I mean, I didn't understand the
19 importance of age verification techniques, the difficulties
20 and obstacles to an investigation of child sex tourism
21 crimes in Cambodia, recordkeeping regarding public records
22 and vital statistics.

23 And is any of that an issue in this case that we
24 need an expert?

25 MR. SINHA: You know, the only one, I think, would

10:24:03 1 be the last one, and that would regard one of the victim's
2 passport.

3 But real candidly, Your Honor, I think that we are
4 fine with the court's ruling that we'll get into what I
5 think is listed as D here and avoid the other three.

6 And insofar as that issue comes up, we would, with
7 the court's permission, just approach and see if that is
8 appropriate at that time.

9 MR. WEINERMAN: So A through D, you are not going
10 to get into?

11 MR. SINHA: I am sorry. A through C, as in car.
12 And then my understanding is the court's ruling is that we
13 can get into D. So that's what we would do.

14 THE COURT: Anything else from defense?

15 MR. WEINERMAN: I don't think so.

16 Anything else?

17 MS. MAXFIELD: No.

18 MR. WEINERMAN: No, Judge.

19 THE COURT: Okay. I thought you had one more
20 thing, and we jumped.

21 MR. SINHA: The only other thing that I have, Your
22 Honor, is the venue. It's really just the special -- or,
23 rather, just the verdict form. And I think we briefed it on
24 Sunday afternoon, basically saying, you know, the way that
25 Counts 1 through 6 are indicted in the superseding

10:25:09 1 indictment is using a venue provision, 3238, for offenses
2 that are committed outside of the district. That's included
3 in the language of those counts in the indictment.

4 When Mr. Johnson submitted their verdict form, it
5 uses a different venue provision for those six counts. And
6 it's the same provision that applies to Count 7 and 8, but
7 we think it doesn't apply to 1 through 6.

8 So it's an early point at which to raise it, but,
9 you know, we just feel like we'll have a real problem if
10 we -- if jeopardy attaches and the court asks us to prove
11 venue because it's a provision that we haven't pled in the
12 indictment.

13 THE COURT: Okay. I am not sure if I understand
14 the issue entirely. Is there no stipulation to venue?

15 MR. WEINERMAN: No, we are not going to stipulate
16 to venue. I understand the argument, and there are two
17 provisions that govern venue, and they can choose either
18 one. What I am hearing is they have chosen 3238 as the
19 venue provision and not 3237.

20 So, you know, I submitted the verdict form. I
21 stand by it and submit it.

22 THE COURT: So what are you asking me to do?

23 MR. SINHA: I am just asking for a pretrial ruling
24 that the venue provision that we indicted on and that
25 appears in the government's jury verdict form, which is 18

10:26:33 1 U.S.C. 3238, is the one that the court will instruct the
2 jury on.

3 THE COURT: Yes.

4 MR. SINHA: That's all. Thank you.

5 THE COURT: Okay.

6 MR. SWEET: Your Honor, if I may, just one more
7 thing, just to briefly address some discovery matters that
8 the defense raised in their trial memo.

9 The most important to the defense I believe that
10 was listed down was access to the A files. The court has
11 granted an order allowing them access to the A files. ICE
12 has that order. The A file of BT XXXXXXXX is here for
13 counsel to review, and I have asked them to order for any of
14 the other witnesses that now have A files as well.

15 So -- and I will continue to work with counsel and
16 ICE to make sure that that happens expediently. I believe
17 that's taken care of.

18 There was also a discussion for information
19 regarding benefits or potential benefits that the witnesses
20 are receiving. We are compiling a list of that. And
21 previous reports also will note money was provided for
22 transportation and money was -- you know, meals were
23 purchased.

24 So -- but we will -- again, some of that has been
25 provided, and additional information will be coming to the

10:27:42 1 defense regarding that.

2 And to the extent we have other things that are
3 being provided, whether it's backpacks while the victims are
4 here, something -- supplies, we will note that and get that
5 to the defense as well.

6 There was also a question regarding payments to
7 Apple. The government's previously provided the defense
8 with the payments that were made by the FBI to a CHS. I
9 know the defense has that. We'll confirm that there was
10 nothing else separately going to Apple, but I believe that
11 one is addressed.

12 And we should be shortly receiving additional
13 notes, which the government will provide and discuss that
14 with the defense in terms of what is being provided and
15 what's not being provided so that if they have any issues
16 with that they can raise that with the court.

17 And, again, additional discovery is going over.
18 However, most of it is either something that has very
19 recently happened or, you know, we just got a batch of
20 transcripts which they had a previous version of -- excuse
21 me -- and this is just, you know, a new and improved
22 version.

23 So we do continue to work with the defense on
24 discovery.

25 I don't think there are any outstanding issues

10:28:56 1 that need to be addressed. However -- and it's been a very
2 professional working relationship regarding that, but there
3 have been a lot of letters and discussions that we have had.

4 So to the extent that the defense feels like there
5 is anything which they believe they are missing or that they
6 have asked for and haven't received, we would welcome that
7 so that we can resolve that one way or another before we hit
8 Monday.

9 MR. WEINERMAN: Well, Judge, something that did
10 come up very recently, yesterday, and I made a request to
11 counsel, and that is -- let me just give you a little
12 background.

13 BT XXXXXXXX is minor No. 1, and he has been in the
14 United States since 2013. He was communicating with
15 Mr. Johnson after -- well, before Mr. Johnson was arrested
16 and then for probably six months after he was arrested when
17 Mr. Johnson was awaiting trial in Cambodia. And he was --
18 BT XXXXXXXX was communicating with Mr. Johnson on a Facebook
19 account, which I believe is entitled BT XXXXXXXX, right?

20 MS. MOSS: Yes.

21 MR. WEINTRAUB: And then suddenly in June of 2014,
22 I think he shut down that account and went into a new
23 account called BT'S FACEBOOKX, I believe.

24 And we believe there has been a lot of
25 communication between BT XXXXXXXX and the other witnesses in

10:30:15 1 the case relating possibly to benefits that BT XXXXXXXX has
2 received, and witnesses who are going to testify for the
3 government might have been either counseled or suggested
4 that they try to obtain such similar benefits in exchange
5 for their testimony.

6 The government doesn't have the BT'S FACEBOOKX
7 Facebook account. They have given us the BT XXXXXXXX
8 Facebook account, but that closed down, I believe in June of
9 2014.

10 So we think that any communications between BT
11 XXXXXXXX and the other Cambodian witnesses, victims named and
12 unnamed, is potentially relevant on the issue of benefits
13 and such. So we would like to find a way to be able to get
14 that.

15 I can think of a couple ways. There's certain
16 limits on our ability to subpoena victims. We have to get a
17 court order, I believe.

18 So what we would like to do is for the government
19 to accept a subpoena for BT XXXXXXXX for that account or,
20 better yet, I think -- although that would be the fastest
21 way because BT XXXXXXXX could, I think, work with Facebook
22 and get that to us or allow us to subpoena Facebook.

23 And we would limit the subpoena to just chats
24 between BT XXXXXXXX and the named victims or the unnamed
25 victims who are the government's other act witnesses. So we

10:31:43 1 would limit it. We are not interested in intruding on his
2 privacy, but we would limit it to that and, I suppose, the
3 other government witnesses, the so-called church witnesses
4 who communicated quite heavily with BT XXXXXXXX in that
5 period of December 2013 to June 2014 about BT XXXXXXXX's
6 attempt to get a visa, extend visas, be able to stay in the
7 United States. So we think that's all very relevant, and we
8 would like to be able to get those chats from his BT'S
9 FACEBOOKX Facebook account.

10 So we are willing to do it the fastest way, the
11 easiest way, and the best way. But we think we should be
12 able to get that information.

13 MR. SWEET: Your Honor, the government would like
14 Mr. Johnson's Facebook communications with his brother or
15 e-mail communications with his brother that we don't have,
16 and those would also be very relevant. But absent doing a
17 search warrant for them, we can't get them.

18 And so we asked BT XXXXXXXX, back in the beginning,
19 for his Facebook messages. He gave us his Facebook account,
20 and we provided that to the defense, both his communications
21 with Mr. Johnson, and I think we pretty much just took his
22 account, dumped it, and provided that to the defense.

23 He is a victim. They don't have a right to just
24 subpoena any information they want from a victim. If there
25 are public postings by BT XXXXXX, they are obviously welcome

10:33:09 1 to see those, or if people on the other end want to show
2 them those, that's fine as well.

3 And they can certainly ask BT XXXXX any questions
4 they want when he testifies as to benefits he's receiving or
5 other related information. But to just subpoena a witness
6 for his private Facebook account is something that we can't
7 just subpoena. I mean, we don't get Facebook through a
8 subpoena. We get it through a search warrant. So we
9 strongly oppose that, Your Honor.

10 THE COURT: Is there anything -- is there anything
11 preventing the defense legally from serving him with a
12 subpoena duces tecum to bring in a copy of his Facebook
13 account?

14 MR. SINHA: Let me have a look.

15 MR. SWEET: Could we have just a moment on that,
16 Your Honor?

17 THE COURT: Yes.

18 MR. SINHA: So just off the bat, Your Honor, I
19 think there's a couple things. I am sorry.

20 MR. WEINERMAN: Nothing. I am sorry.

21 MR. SINHA: Off the bat, I think there's a couple
22 things.

23 There's special protections within Rule 17 about
24 subpoenaing records from child victims, and those are
25 incorporating the victims' rights codified in 31 -- 3771.

10:34:27 1 So I think that Congress has acted to kind of
2 preclude this type of thing. The court would have to find a
3 special -- I think have to make a special order.

4 Also, you know, there's a lot of Rule 17
5 litigation, I think we have had some in this case, that the
6 government has kind of been on the sidelines for about using
7 subpoenas for a discovery device and using it to obtain
8 discovery, which is pretty much what this would be. I mean,
9 they are using a subpoena to obtain materials that they want
10 to review in anticipation of trial.

11 So I think that they would be precluded both under
12 Rule 17 and under the Victims' Rights Act, 3771. And the
13 Victims' Rights Act embodies the notion of preserving the
14 dignity and privacy of victims. And so subpoenaing the
15 personal Facebook records of the victims seems to me to run
16 counter to that.

17 So I suspect that their -- I mean, we've -- given
18 a little bit of time, I think we could probably lay it out
19 better, but I think those are the two things that are going
20 to be in tension with their request.

21 *(Reporter interrupted.)*

22 MR. SINHA: That will be in tension with their
23 request.

24 MR. WEINERMAN: So, Judge, there's just a couple
25 of things. And I don't have the statute or the rule in

10:35:33 1 front of me, so I may be wrong in what I am saying.

2 BT XXXXXXXX is an adult now. He's -- I believe
3 he's 18, and he may even be older. So I am not sure if he's
4 considered a child for purposes of Rule 17 or the other
5 provision, I think it's 3509. And, again, I may be wrong
6 about that, but I remember reading 3509, and it defined
7 victims in terms of someone who is 18 -- under the age of
8 18, I believe. I don't think that statute would protect
9 him.

10 As far as Rule 17, I think we just brought it up
11 here, so let me just read it to myself.

12 So, yes, counsel is correct. Rule 17(c)(3)
13 requires us to get the court's permission if we were to
14 subpoena the Facebook account ourselves and, I suspect, if
15 we were to serve a subpoena on BT XXXXXX through the
16 government for a Facebook account.

17 Let me just step back and say we have thousands of
18 pages of chats. The chats were unbelievable in length
19 between BT XXXXXXXX and other witnesses in this case, in
20 which the subject of visas and extending visas came up, and
21 potential benefits for being a witness for the government or
22 cooperating in the investigation. That went on, again, from
23 December 2013 to June of 2014.

24 So this is not a fishing expedition. There were
25 many, many chats between BT XXXXXXXX and the people from the

10:37:28 1 church who were going to testify; four, five, six of them;
2 between BT XXXXXXXX and other victims; in particular, SO
3 XXXXXXXX, PE XXXXXXXXXXXXXXXX, and others.

4 So just the extent of those and the thought that
5 they did not continue, particularly as trial was
6 approaching, and that witnesses were talking to each other
7 about the benefits that are provided under the United States
8 law to being able to obtain legal status in the United
9 States if you cooperated with the government in a child sex
10 abuse case, you know, we believe that if the pattern that
11 was demonstrated in the earlier chats which we have, it had
12 to continue.

13 It's not going out on a limb. It's not a fishing
14 expedition to believe that that continued past June 2014,
15 maybe up to -- up to this very moment that, you know, the
16 kids communicate on Facebook on a daily basis, some on an
17 hourly basis.

18 So we believe that if that is happening, and we
19 think it is, and the pattern would suggest from the past
20 that it is going on, that we should be able to have those to
21 be able to question the witnesses about the benefits that
22 they either intend to obtain, apply for, or what their
23 expectation is in terms of benefits for testifying for the
24 government in this case.

25 MR. SINHA: Can I respond, Your Honor?

10:39:00

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THE COURT: Yes.

MR. SINHA: Sure. So just as a starting point, Your Honor, it seems to me that Rule 17(h), which precludes a party from subpoenaing a statement of a witness or a prospective witness pretty much explicitly precludes the issuance of a subpoena under here because I think, as Mr. Weinerman has described it, the thing that they are seeking is exactly that is statements of the witnesses and statements of prospective witnesses. And Rule 17 isn't to be used for that.

THE COURT: What does (h) mean? I took that to mean that you are trying to subpoena an actual -- you are trying to force the witness to give an actual statement.

MR. SINHA: As opposed --

THE COURT: As opposed to provide a statement, which --

MR. SINHA: Well, Your Honor, it seems to me that the reference to 26.2 -- 26.2, which off the top of my head I think is a reference to the *Jencks* Act prohibition, you know, the *Jencks* Act -- so, you know, the second sentence, Rule 26.2 governs the production of the statement, it seems to me the reference to the *Jencks* Act here, which deals with written statements, would perhaps say that it may be broader than that.

You know, so it seems to me the mechanism through

10:40:19 1 which these statements are obtained by defense counsel is
2 that if they are in the government's possession, they are
3 obtained under the *Jencks* Act, including 26.2.

4 Here, the statements are not within the
5 government's possession, and, for a variety of reasons, we
6 don't believe that a Rule 17 subpoena to subpoena them from
7 the victim directly is appropriate, both because of the
8 language of Rule 17 and because of the right embodied in 18
9 U.S.C. 3771(a)(8), which counsels that the victims be
10 treated with fairness and respect for their dignity and
11 privacy.

12 And I will note that that prohibition and in fact
13 I think the prohibition of Rule 17 isn't limited to minor
14 victims or isn't limited to victims while they are still
15 minors.

16 MR. WEINERMAN: I guess I will say this:

17 Mr. Johnson is charged with some pretty serious
18 offenses, and he's entitled to a fair trial and he's
19 entitled to defend himself. And there is evidence out
20 there -- I mean, it just cannot be that because the
21 government doesn't have it that we can't obtain it so that
22 he can produce evidence in his favor, compulsory process
23 clause of the Sixth Amendment.

24 So there are ways to preserve the dignity of the
25 victims. It -- a subpoena could be issued and returned to

10:42:02 1 the court. It would be lengthy material. I am not going
2 to -- you know, two, three years, four years of chats, that
3 would be significant. But we really just realized yesterday
4 that this -- this account was closed, the first account, and
5 then the second account opened.

6 And it just seems to me that the benefits that a
7 witness is seeking or expecting or obtaining as a result of
8 testifying in a case, that that motive, that interest, that
9 bias needs to be brought out if Mr. Johnson is going to have
10 a fair trial and we believe there's evidence out there that
11 would prove that that is what the witnesses in this case
12 want and are seeking and expecting.

13 And there has to be a way for the defense to get
14 that information even if the court has to intervene and the
15 court has to look at it in -- before to make sure it is
16 relevant.

17 But this is not a fishing expedition. That sort
18 of evidence was in the prior account, and we believe it's in
19 the new account that the witness obtained.

20 THE COURT: All right. So this is what I am going
21 to suggest, then, is that the defense prepare a third party
22 subpoena to Facebook for the records that you are seeking;
23 that you give notice to this particular witness, BT XXXXX?

24 MR. SINHA: (Nodded affirmatively.)

25 THE COURT: BT XXXXX will then have an opportunity

10:43:32 1 to move to quash before any order is granted, and, if need
2 be, the court can appoint counsel for him if -- if,
3 obviously, the U.S. Attorney is not comfortable standing in
4 that position.

5 At the same time, the U.S. Attorney's Office can
6 file a brief as to how 17(h) plays into this. I am just not
7 convinced that (h) is so broad as to deny the defense the
8 ability to subpoena anything in which his statements have
9 been made within the context of social media. But I
10 don't -- I don't know the history of that section or what
11 it's been applied to in the past.

12 So nothing will happen without further order of
13 the court, but we might as well get that process in place
14 where he's getting notice, you are applying for the order,
15 and we'll see what happens next by way of motion to quash.

16 MR. WEINERMAN: So the court wants us to issue a
17 subpoena for the information we will be talking about --

18 THE COURT: Well, I think you are issuing a motion
19 for the court to allow you to issue a subpoena.

20 MR. WEINERMAN: Okay. So the court wants a
21 motion.

22 THE COURT: And then that motion has to be served
23 on BT XXXXX so that he has notice under Rule 17 so that he
24 can object.

25 MR. WEINERMAN: I assume the government will

10:44:55 1 accept service on his behalf?

2 MR. SINHA: Sure. Sure. Yes, we will, Your
3 Honor.

4 THE COURT: Okay.

5 MR. SINHA: I guess if I may just raise one
6 concern.

7 I don't -- I don't know, but I don't believe that
8 Facebook will provide content information, which is what
9 they are asking for, pursuant to a subpoena.

10 I know we have a right to subpoena them ourselves,
11 the government, under the Electronic Privacy Communications
12 Act, and they just won't give us stuff without a search
13 warrant.

14 So I am not sure if the subpoena, even if it's
15 granted, is the -- I don't know if that's the correct avenue
16 or not, but I am at least raising it so that we can look
17 into it.

18 MR. WEINERMAN: So what I am hearing is we would
19 have to subpoena that information through BT XXXXXXXX is what
20 I am hearing. That Facebook -- it is indeed true that
21 Facebook would not honor the subpoena.

22 THE COURT: So what I would do is prepare a motion
23 to allow for an order subpoenaing BT XXXXX to bring in these
24 records. That will be served on him. He will have notice.
25 He can move to quash. The government can certainly move

10:46:18 1 under (h) to not allow the order to go through.

2 MR. SINHA: And, Your Honor, just by
3 clarification, I suspect the government will end up standing
4 in the shoes of BT XXXXX, which we are allowed to under the
5 Victim Rights Act.

6 Is it okay if we -- we'd like, probably, to brief
7 other aspects of this as well.

8 THE COURT: Right.

9 MR. SINHA: Okay.

10 THE COURT: That's what I am expecting in a motion
11 to quash.

12 MS. MAXFIELD: Your Honor, can I ask one
13 additional with respect to content?

14 The Facebook chats that we have for BT XXXXX, he
15 has been kind of selective as to where they begin and where
16 they end, especially with respect to conversations that he's
17 had with my client.

18 We would -- we would like to add to that subpoena
19 a request that BT XXXXX produce the entire conversation
20 where he's given us partial conversations, and we can
21 identify them, but to ask him to give us what he cut off in
22 the first production.

23 MR. SWEET: Your Honor, I think we are going to
24 object to that as strongly as we object to the other part.

25 And I will say, I mean, I don't know that there's

10:47:28 1 anything to show that he cut them off as opposed to he
2 provided us what he may have just had, and I believe it was
3 a download of his Facebook account is what we received and
4 what we provided.

5 So I don't think we can say that anything was cut
6 off. It may not be complete just by what is saved or not
7 saved, and I think we had the same issue with Mr. Johnson's
8 potential, you know, Facebook account that we got through a
9 search warrant. Sometimes things get deleted or -- so, but
10 I think we'll oppose all of that on the same grounds.

11 THE COURT: The government has given you what they
12 have, right? And if you want to, again, move for an order
13 that he produce more, I can't prevent you from moving for
14 that. We'll have to take it up once he's served and make a
15 determination.

16 But I think we may want to at least ask him first
17 if there was more content that he did not disclose involving
18 those conversations.

19 All right. Anything else for the government?

20 MR. SWEET: Nothing.

21 MR. SINHA: Nothing, Your Honor.

22 THE COURT: Okay. Any questions at all about
23 Friday?

24 And the idea is we will all be here, including
25 Mr. Johnson, in street clothes when all the jurors come up.

10:48:47 1 We'll do general introductions, kind of tell them a little
2 bit about the case, the timing, what the expectations are.

3 And then, you know, what I will probably do is --
4 Char. Char, do we have a witness list?

5 THE CLERK: Pardon me?

6 THE COURT: Do we have a witness list?

7 THE CLERK: They filed witness lists.

8 THE COURT: Okay. I may just ask, rather than me
9 struggle through the names of all the victims or all the
10 witnesses, ask each side if they would read out the names of
11 any potential witness. The more important ones are if there
12 is anybody here locally, I think, so the jury could hear
13 those names.

14 And then I will ask the defense if there's any
15 additional witnesses they might be calling. But then
16 everybody is going to go back down to the jury assembly
17 room, fill out the questionnaires, their picture will be
18 taken, put on the questionnaires so we can remember them a
19 little better, and then my staff will make copies for each
20 side to pick up on Friday afternoon.

21 I expect Monday the only thing we will be doing is
22 picking a jury.

23 MR. SWEET: Your Honor, in terms of exhibits, I
24 know that Your Honor said that there was something in this
25 courtroom at noon.

10:50:14 1 Would there be time after they leave and go down
2 to do the jury questionnaires to discuss that?

3 THE COURT: Right after that there will be a group
4 of students doing a mock trial in here. So it would be --

5 MR. SWEET: Too close.

6 THE COURT: -- probably after lunch.

7 Also, earlier I had asked if we could take the
8 Monday after Mother's Day off. It turns out my mom doesn't
9 want me visiting that day, so we do not have to take that
10 day off. I expect we'll go ahead and utilize that Monday.

11 MR. WEINERMAN: So we are back to starting the
12 defense case on May the 14th?

13 THE COURT: Yes.

14 MR. SINHA: Your Honor, about that, may I ask, if
15 the government's case is going quickly and we feel like
16 there's going to be a gap between the government's case and
17 the defense case, just in terms of scheduling our witnesses,
18 is it -- if we run out of witnesses on Wednesday but we
19 think there's going to be adequate time before the defense
20 case starts on the 14th, can we ask the court to end early
21 or something like that?

22 THE COURT: I am pretty flexible on that.

23 MR. SINHA: Okay.

24 THE COURT: I mean, I don't want to waste a whole
25 afternoon, but if we have to end early because of

10:51:21 1 scheduling, we can do that.

2 MR. SINHA: And one other question.

3 The court said that we would appear with
4 Mr. Johnson in street clothes on Friday. Will all of us be
5 in street clothes or will just Mr. Johnson be in street
6 clothes?

7 THE COURT: I am not sure if I --

8 MR. SINHA: Do you want this to be informal for
9 the jury questionnaire or --

10 THE COURT: Oh, yeah. I mean, I just don't want
11 him in his prison clothes.

12 MR. SINHA: Okay.

13 MR. WEINERMAN: If he wants to wear casual
14 clothes, we won't object.

15 MR. SINHA: All right.

16 THE COURT: All right. Anything else?

17 MR. SWEET: No, Your Honor.

18 MR. WEINERMAN: No, Judge. Thanks.

19 THE COURT: We'll see everybody on Friday.

20 THE CLERK: Judge.

21 THE COURT: Yeah.

22 THE CLERK: Are we going to have voir dire
23 reported?

24 THE COURT: Do either sides want to have voir dire
25 recorded?

10:52:07

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MR. SWEET: Yes, Your Honor.

THE COURT: All right. Yes.

MR. ALLNATT: Then the preliminary jury instructions were e-mailed out yesterday.

MR. WEINERMAN: I am sorry. I just learned that, and I should have recalled this, that we are only authorized to pay for testimony, I think, arguments, opening statement but not voir dire, and we have an agreement here we have taken some time to hammer out where the parties are sharing the costs, so we can't agree to the voir dire. I am not authorized to pay for the voir dire.

Yes.

(The reporter commented.)

MR. WEINERMAN: So we are not transcribing. So there's no additional cost if you are recording it?

(Reporter nodded affirmatively.)

MR. WEINERMAN: Then I am fine with that, Judge.

THE COURT: If there's anymore logistical questions, just please e-mail as a group to me and I will get back to you.

And if you need any technical assistance before trial starts, how to use the monitor, the computer hookup, Ms. Pew can walk you through all that.

THE CLERK: What time Friday, Judge, do you want to meet here?

10:53:32

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THE COURT: 9:00?

THE CLERK: I mean after in the afternoon.

THE COURT: Probably 1:30.

THE CLERK: 1:30. Okay.

MR. WEINERMAN: Can I ask, and I would -- this question is for Ms. Anderson, but she shouldn't be talking. She should be reporting. Could we find out when the transcript of today's proceedings are going to be available?

(The reporter commented.)

MS. MAXFIELD: Give me the cost estimate. I think we probably need to do this through CJA.

MR. WEINERMAN: You can just send it to me and I will get it to Ms. Maxfield. So either way.

Thank you.

THE COURT: All right. We can go off the record.

*(The proceedings were concluded this
24th day of April, 2018.)*

10:54:21 1 I hereby certify that the foregoing is a true and
2 correct transcript of the oral proceedings had in the
3 above-entitled matter, to the best of my skill and ability,
4 dated this 25th day of April, 2018.

5
6 /s/Kristi L. Anderson

7 Kristi L. Anderson, Certified Realtime Reporter
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